

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Petition for Waiver of Airtouch Paging
of Sections 64.1300(c) and (d)
of the Commission's Rules

CC Docket No. 96-128

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
IN SUPPORT OF
PETITION FOR WAIVER OF AIRTOUCH PAGING

The Telecommunications Resellers Association ("TRA")¹, through undersigned counsel and pursuant to *Public Notice*, DA 97-2735 (released December 31, 1997), hereby submits the following comments in support of the "Petition for Waiver" ("Petition") filed by Airtouch Paging ("Airtouch") in the captioned proceeding. In its Petition, Airtouch requests that the Commission waive the obligation to compensate on a per-call basis for originating toll free and access code calls any payphone service provider ("PSP") which does not provide payphone-specific coding digits on a "real-time" basis. Airtouch further requests that the Commission grant such relief retroactive to the October 7, 1997 effective date of the per-call payphone compensation mechanism.

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. The overwhelming majority of TRA's resale carrier members provide interexchange telecommunications services, and hence, are required to compensate payphone service providers (either directly or through their underlying network service providers) for payphone-originated toll free and access code calls.

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In TRA's view, Airtouch has made a showing sufficient to warrant grant of the equitable relief it requests here. Airtouch has identified "special circumstances [that] warrant a deviation from the general rule" and demonstrated that "such a deviation will serve the public interest."² Equity requires that interexchange carriers ("IXCs") and their toll free service subscribers must either be provided the payphone-specific coding digits necessary to selectively block payphone-originated toll free and access code calls or be relieved of the obligation to compensate those PSPs which do not deliver such data on a "real-time" basis. The small to mid-sized resale IXCs which comprise the "rank and file" of TRA's membership will be severely and irreparably harmed absent such action and the public interest certainly would not be well served by undermining what constitutes the most vibrant and dynamic segment of the long distance industry.

Accordingly, TRA urges the Commission not only to grant the limited waiver requested by Airtouch, but to extend that waiver to all IXCs.

I.

ARGUMENT

In waiving the obligation of PSPs to deliver on a "real-time" basis payphone-specific coding digits, the Commission emphasized (i) the "special circumstances" of PSPs that were incapable of transmitting such data, (ii) the inequity of denying such PSPs fair compensation for originating toll free and access code calls, and (iii) the lack of significant harm to IXCs that have not only benefited from reductions in common line access charges resulting from the removal of

² Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Order), CC Docket No 96-128, FCC 97 2162, ¶ 10 (Oct. 7, 1996) (*citing* WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

payphone-related subsidies, but have assessed payphone surcharges on consumers based on subsequently-delivered -- *i.e.*, "non-real-time" -- data.³ According to the Commission, such "special circumstances," equitable considerations and absence of significant harm all justify grant of a waiver. TRA agrees with Airtouch that these same factors argue strongly for waiving the obligation to compensate on a per-call basis for originating toll free and access code calls those PSPs which do not deliver payphone-specific coding digits on a "real-time" basis.

First, Airtouch is correct that by relieving roughly forty percent of PSPs of their obligation to provide payphone-specific coding digits on a "real-time" basis, the Commission created "special circumstances" more than sufficient to warrant grant of the limited waiver sought by Airtouch, expanded to encompass all IXC's. The ability of IXC's to block calls was a central component of the Commission's "market-based" payphone compensation mechanism. As expressed by the Commission, "carriers that are concerned about overcompensating PSPs for subscriber 800 calls have substantial leverage, by way of the ability to block these calls from all or particular payphones, to negotiate with PSPs about the appropriate per-call compensation amount."⁴ During the pendency of the waiver of the obligation to pass payphone-specific coding digits, IXC's have been denied the benefit of this key element, producing a compelling "special circumstance" justifying grant of a waiver of IXC's compensation obligations.

³ Id. at ¶¶ 10 - 13; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Memorandum Opinion and Order), CC Docket No. 96-128, FCC 97-2622, ¶¶ 7 - 13 (Dec. 17, 1996).

⁴ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Order on Reconsideration), 11 FCC Rcd. 21233, ¶ 71(1996), *vacated in part sub nom. Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 560, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997).

Second, it is clearly inequitable to compel IXCs to compensate PSPs for originating toll free and access code calls without providing these carriers an opportunity to decline to accept such calls. A central component of a free marketplace is the right to elect to deal or not to deal with individual vendors. Market forces can only discipline supplier behavior if such freedom of choice exists. While regulation is often required to blunt the market power of monopoly or oligopoly providers, rules which compel entities operating in a competitive market to accept service from "mini-monopolists" -- at "market-based" rates effectively set by such "mini-monopolists" -- turn regulation on its head, producing bad public policy.⁵

Third, the Commission is dead wrong that small to mid-sized IXCs are not being significantly harmed by the obligation to compensate on a per-call basis PSPs that are not providing payphone-specific coding digits on a "real-time" basis. Contrary to the Commission's apparent assumptions, reductions in access charges are not being passed through to resale carriers. Resale carriers operate pursuant to contracts with their underlying network service providers. Such contracts generally provide for set per-minute pricing and the flow-through of cost increases resulting from regulatory action. Given disparities in negotiating leverage, it is the rare resale contract that provides for comparable flow-throughs of regulatory-driven cost reductions. Thus,

⁵ As the Commission has acknowledged, "there are certain locations where, because of the size of the location or the caller's lack of time to identify potential substitute payphones, no 'off-premises' payphone serves as an adequate substitute for an 'on-premises' payphone." Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Report and Order), 11 FCC Rcd. 20541, ¶ 15, *recon.* 11 FCC Rcd. 21233(1996), *vacated in part sub nom. Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 560, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997). TRA submits that for transient callers, this is unfortunately more often the rule than the exception. Contrary to the Commission's stated belief, most payphones will thus not "face a sufficient level of competition from payphones at nearby locations to ensure that prices are at a competitive level." *Id.* And even where alternatives are reasonably proximate, TRA submits that it is simply not realistic to assume that a consumer, having located a payphone in an airport, or in a parking garage, or in a restaurant or on the street, will elect not to use that phone because there *might* be another payphone elsewhere that *might* be less expensive.

payphone surcharges assessed by underlying network service providers on their resale carrier customers constitute "pure and simple" cost increases for these resale providers.

Among carriers, small to mid-sized providers are the least well positioned to pass-through significant cost increases to their customers. Because of their smaller size and relatively limited financial resources, as well as the unique characteristics of their customer bases, the impact of regulatory requirements on such carrier members tends to be magnified.⁶ And given the manner in which pre-paid calling cards are used, smaller providers of this service may be denied this "pass-through" opportunity.

While the telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high-growth companies and newly-created enterprises, the "rank and file" of TRA's membership is still comprised of small to mid-sized carriers serving predominantly small to mid-sized businesses.⁷ The small business customers of TRA's resale carrier members are highly resistant to the imposition of additional charges, particularly large, unanticipated assessments. The experience of TRA's resale carrier members to date in attempting to pass through payphone compensation, paid either directly or to underlying network service providers in conjunction with both the interim per-phone and the

⁶ Of course payphone compensation is only one of several large new regulatory assessments being levied on small to mid-sized carriers (and their small business customers) by the Commission. Such carriers are now paying the new \$2.75 per month, per line multi-line business preferred interexchange carrier charge and will soon be contributing roughly four percent of their end user revenues to universal service support mechanisms. *See* 47 C.F.R. 69.153(d); Public Notice, DA 97-2392 (First Quarter 1998 Universal Service Contribution Factors Revised and Approved) (released Dec. 16, 1997).

⁷ The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual revenues of \$10 million and employs in the neighborhood of 50 people. The average customer of a TRA resale carrier member is a commercial account generating \$100 to \$1,000 of usage a month. Source: TRA's "1996 Reseller Membership Survey & Statistics" (Sept. 1997).

current per-call compensation mechanisms, has confirmed the intensity of this resistance, as well as the adverse competitive ramifications of attempting to impose large new charges on small commercial accounts. Unfortunately, smaller resale carriers, unlike some of their larger network-based competitors, do not have the traffic volumes over which to spread amounts paid to originate toll free or access code calls from payphones without significantly increasing rates. Nor do smaller carriers have the operating margins within which to absorb such amounts without adversely impacting their financial viability.

While blocking calls from individual payphones is not an attractive alternative for small to mid-sized carriers,⁸ call blocking at least permits smaller providers to exercise financial control, and perhaps negotiate a more rational compensation level.⁹ Absent call blocking, smaller carriers face potential financial liability of unknown proportions, all too aware that their prospects for recovery of such amounts from their small business customers are limited.

Unfortunately, call blocking is not possible in the absence of payphone-specific coding digits. As the Commission has acknowledged, "[t]he waiver will, we recognize, require IXCs

⁸ Smaller carriers tend to serve niche markets and, accordingly, are often much more reliant upon a particular service offering than their far larger network-based competitors. Pre-paid and post-paid calling cards are a central service offering for many of TRA's resale carrier members, and, accordingly, these carriers rely heavily upon pre-paid and post-paid calling card revenues for financial viability. For such carriers, blocking access code calls from all or some payphones is a painful alternative. Call blocking severs a key revenue stream, limiting business options and leaving customers disgruntled. But at least call blocking would permit smaller providers to exercise financial control and perhaps ultimately to negotiate a more rational compensation level.

⁹ "[T]he Commission expected the IXCs would have 'substantial leverage' to negotiate due to their ability to block subscriber 800 calls from any particular PSP's payphones." Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555, 560, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997).

to pay compensation for certain calls without the ability to block those calls on a real-time basis."¹⁰

Thus, smaller IXCs that desire to avoid paying inflated payphone compensation are left with an even less attractive alternative - *i.e.*, ceasing to provide such key services as inbound "800"/"888" and pre-paid and post-paid calling card.

Exacerbating this problem are the unique circumstances facing the many TRA resale carrier members which are currently offering pre-paid calling cards. A pre-paid calling card provider must have "real-time" access to payphone-specific coding digits in order to debit charges unique to payphone-originated calls. Absent such "real-time" access, pre-paid calling card providers have no way to recover amounts paid to compensate PSPs for the access code calls placed using pre-paid calling cards; the one and only time such recovery can be effected is when a call is placed. Monthly or quarterly statements are meaningless when cards can be depleted with a single call. Thus, without payphone-specific coding digits, pre-paid calling card providers will have no choice but to absorb amounts paid to compensate PSPs for payphone-originated access code calls and suffer the obvious adverse financial consequences, or to raise rates for all users and suffer the adverse competitive consequences.

Small to mid-sized carriers, particularly those providing pre-paid calling card services, should not be forced to assume new and unknown liabilities which may threaten their financial viability, as well as their customer relationships and hence their competitive position. Equity demands that payphone compensation obligations should be linked to the ability of the payors to manage associated liabilities through selective blocking of payphone-originated toll free and

¹⁰ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Order), CC Docket No 96-128, FCC 97-2162 at ¶ 13.

access code calls. Airtouch has it right; per-call payphone compensation obligations should apply only for those PSPs which provide payphone-specific coding digits on a "real-time" basis.

II.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant the Petition for Waiver of Airtouch Paging, expanded to encompass all IXC's, and to waive, retroactive to the October 7, 1997 effective date of the per-call payphone compensation mechanism, the obligation to compensate on a per-call basis for originating toll free and access code calls any payphone service provider which does not provide payphone-specific coding digits on a "real-time" basis.

Respectfully submitted,

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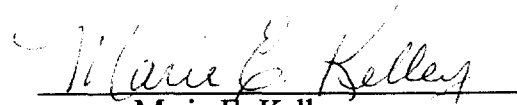
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January 15, 1998

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CERTIFICATE OF SERVICE

I, Marie E. Kelley, hereby certify that copies of the foregoing document were mailed this 15th day of January, 1998, by United States First Class mail, postage prepaid, to the individuals on the attached service list.



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